TRANSCRIPT OF

SUPREME COURT OF THE U

OCTOBER TERM,

No. 69

GEORGE T. EMMONS AND OTTO NELSON,
IN ERROR,

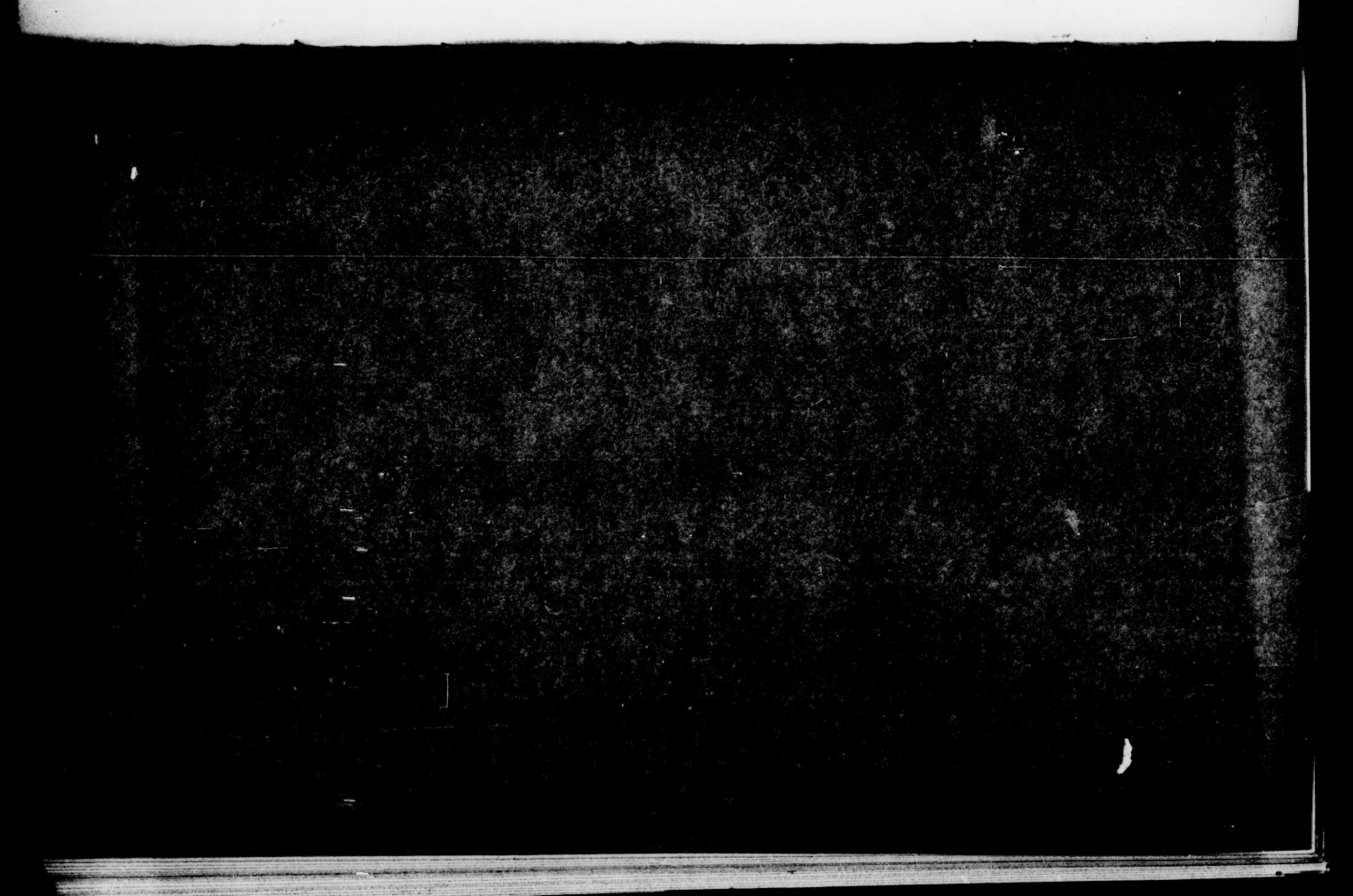
vs.

THEODORE HALTERN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
THE DISTRICT OF ALASKA.

FILED DECEMBER 3,

(14,434.)



(14,434.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 361.

GEORGE T. EMMONS AND OTTO NELSON, PLAINTIFFS IN ERROR,

vs.

THEODORE HALTERN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1893.

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1 To the Hon. Supreme Court of the United States of America:

I, Henry E. Haydon, clerk of the United States district court in and for the district of Alaska, do hereby certify and make return that the foregoing and annexed is the original writ of error in the action therein intitled, in which Theodore Haltern is plaintiff and George T. Emmons and Otto Nelson are defendants, and that annexed hereto is a true copy of the record in said case, and of the assignments of errors, and of all the pleading-, judgment, evidence, and proceedings in said case; all of which I hereby transmit to your hon. court under my hand and seal, agreeably to the rules in such case made and provided.

Witness my hand and official seal this the 12th day of April, A. D. 1890.

HENRY E. HAYDON, *Clerk.*

[Seal United States District Court, Alaska.]

2 In the District Court of the United States for Alaska.

THEODOR- HALTERN, Plaintiff,
vs.
GEO. T. EMMONS and OTTO NELSON, Def'ts.

Now comes the defendants, by their attorneys, Delaney & Gamel, and except to the ruling of the court, in this:

1.

That the court erred in allowing the plaintiff to introduce any evidence under his complaint, as specifically appears in exceptions taken on the trial, hereto annexed and made a part of this bill of exceptions, marked Exhibit "A," and as will specifically appear by reference to said complaint, hereto annexed and made a part of this bill of exceptions, marked Exhibit "B."

2.

That the court erred in overruling the motion for a nonsuit interposed by defendants, as specifically appears in said Exhibit "A," hereto annexed.

3 3.

The court erred in its instructions to the jury as follows:

1. Commencing at and inclusion of the following words: "If your verdict be for the plaintiff, it should be that he is entitled to the possession of the property described in the complaint and should fix*d* the nature and duration of such estate, with such damages for the with-olding the property up to the time of your verdict (exclusive of the use of the permanent improvements made by defendant), and if you find that defendant Nelson or those under whom he claimed has made permanent improvements upon the property in good faith, holding

under color of title adversely to the claim of plaintiff, the value of such improvements at the time of trial must be allowed by you as set-off against such damages. The nature and duration of the estate to be found by you must be such nature and duration as was recognized by the treaty between Russia and the United States, the articles of transfer, and subsequent acts of Congress, for
4 fa-ther than this it will be impossible to go under existing circumstances. Of course, if you do not find any damages in favor of the plaintiff the value of improvements made by defendant cuts no figure in the case."

2. Commencing at and inclusion of the following words: "Plaintiff must have had a legal estate at the time of the commencement of the action as contradistinguished from an equitable title, and so far as any one can have a legal estate other than in fee simple in Alaska he must be considered to have had such if the same could have been derived from his grantors and predecessors in interest. A legal estate may be acquired by adverse possession for such a length of time that the statute of limitations may be invoked to sustain it—that is to say, undisturbed possession may ripen into a legal title, and as against one party a person may have a legal title, though as against the Government it may not have been perfected."

3. Commencing at and inclusion of the following words: "If you should find that at the time of the cession the property in
5 dispute was in fact the ice-house on lot No. 55 on the plan, that the same was owned by Moss & Baum, and that they or either of them transferred their right to plaintiff, and that he has not parted therewith, and that his possession was prior to that of defendant, then it follows, as a matter of law, that plaintiff had such a legal estate in the property as under the statute would entitle him to maintain the action, and unless defendant can show a better title and a present right of possession, plaintiff is entitled to a verdict at your hands."

5. Commencing at and inclusion of the following words: "In order to defeat the plaintiff the defendant must show that his right to occupy and possess the land is superior to that of plaintiff—that is, he must show that the premises were unused and unoccupied public domain at the time he entered into possession. If they were used and occupied by plaintiff at that time, and that plaintiff was owner in common as successor to Baum, defendant's grantor, Clark, as against the plaintiff, was a mere intruder, without any right
6 whatever, and whatever buildings he erected were erected at his own risk, and your verdict must be for plaintiff."

6. Commencing at and inclusion of the following words: "If plaintiff or his grantor, Baum, at the time of the passage of the organic act was actually in the use or occupation of the land in dispute or claimed it, whether in their own right absolutely or as tenants in common, the Government could not disturb him, and he and his tenant in common are, unless they abandoned all claim, the only persons who could obtain title by future legislation. As against the defendant, he or his cotenants have the only legal estate in the

property which is recognized by the organic act, so far as there can be any legal estate."

4.

The court erred in refusing to give the instruction asked for by defendants, hereto annexed, marked Exhibit "C," and made a part of this bill of exceptions.

5.

The court erred in overruling the motion filed by defendants for a new trial, the ground of said motion being specifically set forth, as will appear by reference to Exhibits "D," "E," and F,"
7 hereto annexed and made a part of this bill of exceptions.

The foregoing exceptions were duly taken as stated.

JOHN S. BUGBEE,
U. S. Dist. Judge.

8 EXHIBIT A.

In the District Court of the United States for Alaska.

THEODOR- HALTERN, Plaintiff,
vs.
GEO. T. EMMONS and OTTO NELSON, Def'ts.

Exceptions Taken by Defendants as Made in Open Court During the Trial.

1.

Defendants objected to plaintiff giving any evidence under his pleadings, as the complainant failed to set forth the nature and extent of the estate of the plaintiff in the disputed premises, and that a failure on the part of the plaintiff to allege the nature of his estate, whether in fee, for life, or for a term of years, was fatal to the jurisdiction of this court. Objection overruled.

2.

Defendants moved that the plaintiff be nonsuited on the grounds that the documentary evidence of title upon which the plaintiff relied does not give him such a legal estate as will entitle the plaintiff to maintain an action in ejectment, as said documentary
9 evidence of title shows the legal title of the premises in dispute to be in the United States, and that plaintiff and his grantors are and were occupiers of the public domain of the United States without right or title.

(Motion overruled & defendants except.)

The above exceptions were taken to the ruling of the court on the trial.

JOHN S. BUGBEE,
U. S. Dis't Judge.

10 EXHIBIT "B."

In the District Court of the United States in and for the District of Alaska.

THEODORE HALTERN
vs.
GEORGE T. EMMONS and OTTO NELSON.

The plaintiff, Theodore Haltern, shows to the court that he is a citizen of the United States.

That when Alaska was ceded to the United States by Russia what is marked on the plat of Sitka attached to the protocol of transfer as lot 55 was occupied by an ice-house built upon a foundation of heavy timbers lain at short intervals along the ground, the property of J. Mora Moss and Charles Baun, citizens of the United States, and the same was conveyed to them by P. Maksoutoff, governor of Russian colonies in America, by deed dated Oct. 2d, 1867, which was approved Oct. 26th, 1867, by the commissioners appointed by Russia and the United States to make the transfer of Alaska, as appears by Record Deed Book "A," at pages 4 and 5, and listed by them as private property.

That said Moss and Baun sold, assigned, and transferred all their right, title, and interest in and to said house and lot to the plaintiff, then a citizen of the United States, for a valuable consideration in hand paid, and the plaintiff took possession thereof.

11 That said ice-house was some years ago blown down by a storm and all of it removed except said foundation.

That in 1885 plaintiff's health became impaired and he had to leave Sitka and Alaska, and remained away on account of his health until 1889, but before going away he placed a good and substantial fence around said lot, and the same is still there in good repair and has been there since built; that prior to leaving Sitka plaintiff was in possession of said lot, claiming the same as his own, and when he left put all his matters in the hands of his agent and kept an agent there looking after his interests until his return.

That during the year 1887, fall or winter, one W. Clark wrongfully and without plaintiff's knowledge or consent went upon said lot and built a house, which he shortly thereafter and during the winter of 1887 and 1888 sold and undertook to transfer to one Otto Nelson, who now wrongfully and unlawfully detains the same and keeps the plaintiff out of the possession and control of his said property.

That said house is at present occupied by one George T. Emmons, who claims to hold possession thereof as the tenant of said Nelson.

That plaintiff is entitled to the possession of said property

12 and damages for withholding same from him in the sum of five hundred dollars ($500).

Wherefore plaintiff asks judgment for the possession of said prop-

erty, also for five hundred dollars damages, and for his costs and disbursements against said Nelson.

THEODORE HALTERN,
By WHIT. M. GRANT, *His Att'y.*

I, Theodore Haltern, on oath depose and say that I am plaintiff in the above-entitled action; that I have heard the complaint read and the allegations thereof are true as I verily believe.

(Signed) THEODORE HALTERN.

Subscribed and sworn to by Theodore Haltern before me this 11 day of Oct., 1889.

H. E. HAYDON, *Clerk.*

12½ [Endorsed:] Theodore Haltern *vs.* George T. Emmons, Otto Nelson. Copy complaint.

13 If you find for the plaintiff, and you believe that the defendant purchased said premises in good faith and improved the same in good faith, you shall find that the defendant Otto Nelson shall have and recover the purchase price and the amount of improvements placed upon the premises from the defendant.

EXHIBIT "C."

Instruction asked for by def'ts.
Refused.

JOHN S. BUGBEE,
U. S. Dist. Judge.

14 In United States District Court in and for the District of Alaska.

THEODORE HALTERN, Plaintiff,
vs.
GEO. T. EMMONS and OTTO NELSON, Def'ts.

Comes now the defendants, by their attorneys, and moves the court to set aside the verdict rendered in this cause, and assigns the following reasons:

1.

That said verdict was contrary to the law and to the evidence and to the instructions of the court.

2.

That said verdict is so vague and uncertain in its terms that process of this court could not legally issue thereon.

DELANEY & GAMEL,
Att'ys for Def'ts.

Exhibit "D."

if you find such to be the fact the building so used was not transferred to this Government by the treaty, but such buildings
20 remained subject to the control of their owners, who retained also a possessory right to the land on which they were erected, such possessory right being naturally essential to the enjoyment of their property, but such owners had no title in fee to the land in dispute, it not being one of the granted lots, as I have stated. When the actual transfer of the Territory was made, on Oct. 26, 1867, the commissioners of the respective governments attached to the certificate or articles of transfer certain inventories of public and private property in Sitka, embracing that which was actually transferred as well as that which remained in individual ownership. One of these inventories was marked "D," and was designated inventory of private property in the city of New Archangel (Sitka), with the numbers and letters indicating the situation of dwelling-houses, establishments, and lots of ground as marked on the plan of the city attached to the protocol of transfer. There was also a map, which has been offered in evidence here as the plan of the city referred to in the inventory. The inventory and map show that lot number 55 on the plan was described as an ice-house. This is the lot in dispute in this action. Plaintiff claims that prior to and at the time of the transfer the ice-house was the property of J. Mora Moss and Charles Baun, their ownership having
21 been certified to prior to the transfer by the governor of the Russian colonies in America; that Moss and Baun assigned their interest therein to plaintiff, who took possession thereof and fenced in the lot prior to 1885; that in 1887 one Clark, the defendant's grantor, wrongfully entered upon the lot, and in place of the ice-house, which had been blown down, erected a house, which at the time of the commencement of the action was occupied by the defendant Emmons. Defendant denies any transfer to Moss & Baun by the governor, the transfer to plaintiff by Moss & Baun, and that the premises were ever listed or marked as private property by the commissioners of the two governments, but admit the entry by Clark and his sale to defendant Nelson, and claim that at the time of the execution of the treaty the premises were occupied by and belonged to the Russian-American Company, a corporation existing under a charter from the Russian government, and that under the provisions of that treaty all the rights, grants, privileges, and franchises of said company within Alaska were extinguished and the property in question was transferred to the United States and thereupon became subject to entry and occupation as unused and unoccupied domain of our Government (although no evidence has been offered as to that), and that as such unused and un-
22 occupied land Clark rightfully entered upon and took possession of it and erected a dwelling-house thereon.

3. If you should find that at the time of the cession the property in dispute was in fact the ice-house on lot number 55 on the plan, that the same was owned by said Moss & Baun, and that they or either of them transferred their right to plaintiff, and that he has not parted therewith and that his possession was prior to that of

defendant, then it follows as a matter of law that plaintiff had such a legal estate in the property as under the statute would entitle him to maintain the action, and unless defendant can show a better title and a present right of possession plaintiff is entitled to a verdict at your hands. The interest and estate held by Moss & Baun was held by them in common. It has not been shown that plaintiff succeeded to the interest of Moss by any regular conveyance, Moss having died, and the deed of his executor and executrix being insufficient to convey his interest; but a deed from Baun to plaintiff has been put in evidence the legal effect of which is to make plaintiff a tenant in common with the heirs or devisees of the deceased, and as such tenant in common plaintiff is entitled to maintain this suit against the defendant; and if you find that plaintiff has
23 so succeeded to the title of Baun, then you may, if other circumstances herein —, find a verdict for plaintiff for the entire interest, notwithstanding the fact that he is the owner of only an undivided interest in common, and that his cotenant is not joined.

Although defendant sets up in his answer that the premises in dispute were at the time of the cession the property of a corporation, he does not claim to have succeed to it in interest, and does not in fact set up nor has attempted to prove any legal estate whatever, but relies upon his right to occupy and possess the land as unused and unoccupied domain of the United States.

4. In order to defeat the plaintiff the defendant must show that his right to occupy and possess the land is superior to that of the plaintiff—that is, he must show that the premises were unused and unoccupied public domain at the time he entered into possession. If they were used and occupied by plaintiff at that time and plaintiff was an owner in common as successor to Baun, defendant's grantor, Clark, as against the plaintiff, was a mere intruder, without any right whatever, and whatever buildings he erected were erected at his own risk, and your verdict must be for the plaintiff.

24 As I have stated, under the existing laws neither plaintiff nor defendant can claim a fee-simple title to the land in controversy. The treaty and cession recognized absolute title only to the building which was on the land, the right to possession of which is in dispute here; but that right to posession was distinctly affirmed by the organic act passed May 17, 1884, which said, "that Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which said persons may acquire title to such lands is reserved for future legislation by Congress."

If plaintiff or his grantor, Baun, at the time of the passage of the organic act was actually in the use or occupation of the land in dispute or claimed it, whether in their own right absolutely or as tenants in common, the Government could not disturb him, and he and his tenant in common were and are, unless they abandoned all claim, the only persons who could obtain title by future legislation as against the defendant; he or his cotenant have the only legal es-

tate in the property which is recognized by the organic act so far as there can be any legal estate.

25 & 26 If you should find for plaintiff it is your duty to consider and admeasure what, if any, damages he has sustained by reason of the wrongful occupation by the defendants of the premises, but against these you may offset so far as it may be the value of the improvements put on the premises if you believe such improvements were made in good faith. The fact that defendant's grantor was a lawyer and advised defendant that his title was good has nothing to do with your verdict except in so far as it may show defendant's good faith in the matter.

27 In the District Court of the United States in and for the District of Alaska.

THEODORE HALTERN
vs.
GEORGE T. EMMONS and OTTO NELSON. } Complaint.

The plaintiff, Theodore Haltern, shows to the court that he is a citizen of the United States.

That when Alaska was ceded to the United States by Russia what is marked on the plat of Sitka attached to the protocol of transfer as lot 55 was occupied by an ice-house, built upon a foundation of heavy timbers lain at short intervals along the ground, the property of J. Mora Moss and Charles Baum, citizens of the United States, and the same was conveyed to them by P. Maksoutoff, governor of Russian colonies in America, by deed dated Oct. 2, 1867, which was approved Oct. 26, 1867, by the commissioners appointed by Russia and the United States to make the transfer of Alaska, as appears by Record Deed Book "A," at pages 4 and 5, and listed by them as private property.

28 That said Moss and Baum sold, assigned, and transferred all their right, title, and interest in and to said house and lot to the plaintiff (then a citizen of the United States) for a valuable consideration in hand paid, and the plaintiff took possession thereof.

That said ice-house was some years ago blown down by a storm and all of it removed except said foundation.

That in 1885 plaintiff's health became impaired and he had to leave Sitka and Alaska, and remained away on account of his health until 1889, but before going away he placed a good and substantial fence around said lot, and the same is still there, in good repair, and has been there since built.

That prior to leaving Sitka plaintiff was in possession of said lot, claiming the same as his own, and when he left put all his matters in the hands of his agent and kept an agent there looking after his interest until his return.

That during the year 1887, fall or winter, one W. Clark,
29 wrongfully and without plaintiff's knowledge or consent, went upon said lot and built a house, which he shortly thereafter

and during the winter of 1887 and 1888 sold and undertook to transfer to one Otto Nelson, who now wrongfully and unlawfully detains the same and keeps the plaintiff out of the possession and control of his said property.

That said house is at present occupied by one George T. Emmons, who claims to hold possession thereof as the tenant of said Nelson.

That plaintiff is entitled to the possession of said property and damages for withholding the same from him in the sum of five hundred dollars ($500.00).

Wherefore plaintiffs asks judgment for the possession of said property; also for five hundred dollars damages and for his costs and disbursements against said Nelson.

THEODORE HALTERN,
By WHIT M. GRANT, *His Att'y.*

I, Theodore Haltern, on oath depose and say that I am plaintiff in the above-entitled action; that I have heard the complaint
30 read, and the allegations thereof are true, as I verily believe.

THEODORE HALTERN.

Subscribed and sworn to by Theodore Haltern before me this 11th day of Oct., 1889.

H. E. HAYDON, *Clerk.*

Filed October 11, 1889.

HENRY E. HAYDON, *Clerk.*

31 In the District Court of the United States for the District of Alaska.

THEODORE HALTERN, Pl'f,
vs.
GEORGE T. EMMONS and OTTO NELSON, Def'ts. } No. 211. Summons.

The President of the United States of America to George T. Emmons and Otto Nelson, the above-named defendants, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Sitka, in said district, and answer the complaint filed against you in the above-entitled action within 10 days from date of the service of this summons upon you, and if you fail so to appear and answer for want thereof the plaintiff will take judgment against you for the relief prayed for in the complaint.

32 And this is to command you, the marshal of said district, or your deputy to make due service and return of this summons. Hereof fail not.

Witness the Honorable John H. Keatley, judge of said district court, and the seal of said court, affixed at Sitka, in said
[SEAL.] district, this 11 day of October, 1889.

HENRY E. HAYDON, *Clerk,*
By —— ——, *Deputy Clerk.*

[Endorsed:] No. 211. In the district court of the United States for the district of Alaska. Theodore Haltern, pl'f, *vs.* George T. Emmons and Otto Nelson, def'ts. Summons. Returned and filed October 11, 1889. Henry E. Haydon, clerk, by —— ——, deputy clerk.

33 In United States District Court, District of Alaska.

THEODORE HALTERN
vs.
GEORGE T. EMMONS and OTTO NELSON. } Answer of George T. Emmons.

Comes now George T. Emmons, defendant, and answers that he occupies the premises in controversy merely as tenant of defendant Nelson, has no other interest and makes no further claim thereto, and has notified said Nelson of the service of summons upon him and that he must appear and defend said suit, and therefore asks judgment for costs.

I, George T. Emmons, on oath depose and say that I am one of the defendants in above suit. I have read the above answer, and the allegations thereof are true, as I verily believe.

G. T. EMMONS.

Subscribed and sworn to by George T. Emmons before me this 17 day of October, 1889.

[SEAL.] H. E. HAYDON, *Clerk.*

Filed October 17, 1889.

H. E. HAYDON, *Clerk.*

34 In the District Court of the United States for the District of Alaska.

THEODORE HALTERN, Plaintiff,
vs.
GEORGE T. EMMONS and OTTO NELSON, Def't. } Amended Answer.

Comes now the defendants, and for answer to the plaintiff's complaint deny and say—

1.

That defendants have no knowledge or information sufficient to form a belief as to whether the said plaintiff is a citizen of the United States or not, and therefore deny the same.

2.

Deny that J. Mora Moss and Charles Baum ever transfer-ed the premises in dispute to the said plaintiff, by deed or otherwise, or that the said premises in dispute were ever transferred to the said Moss and Baum by the governor of Russian colonies in America, P. Maksutoff, by deed or otherwise, or that any of said transfers were ever made at all.

35 3.

Deny that the premises in dispute *was* listed and marked by the commissioners commissioned by the United States and Russia to make the transfer of Alaska from Russia to the United States as private property.

4.

Den*ies* that the plaintiff is entitled to the possession of the said premises in dispute, or that he was ever entitled to the possession thereof, or that the said plaintiff is damaged in the sum of $500.00 or any other sum.

5.

Defendants admit that during the year of 1887 Willoughby Clark entered upon and took possession of the premises in dispute and erected a house thereupon and afterwards sold and transferred said premises and house to the said defendant Otto Nelson, but deny that said entrance and taking possession of said premises by the said Clark was wrongful.

36 6.

That said defendant- *has* no knowledge — information sufficient to form a belief as to the said Moss and Baum being citizens of the United States, and therefore deny the same.

7.

The defendants admit that the defendant Otto Nelson is in possession of the lot of ground described in the complaint and has been in such possession for several months past, and that the defendant George T. Emmons at the time of the commencement of this action was occupying the dwelling-house situated on said lot as tenant of the said Otto Nelson.

8.

And for further answer to the said complaint the defendants allege upon information and belief that at the time the treaty of March, 1867, whereby Russia ceded Alaska to the United States, was concluded the premises set forth in the complaint *was* occupied by and the ice-house or other buildings situated thereon be-
37 longed to the Russian-American Company, which company was a corporation created by the Russian government and enjoying certain special privileges and franchizes granted by a charter from the Emperor of Russia to said company, and that under the provisions of the treaty aforesaid all the rights, grants, privileges, and franchizes of the said company within the dominion of Alaska were extinguished by the said treaty, and the property mentioned and described in the said complaint was thereby transferred to the United States free and clear from all right, title, and interest of the said Russian-American Company in and to the same.

9.

That during the summer and fall 1887 the defendant's grantor, Willoughby Clark, entered upon and took possession of the said lot as a part of the unused and unoccupied public domain of the United States, subject to entry and occupation as such, and erected and caused to be erected the dwelling-house now standing thereon.

10.

38 That on the 24th day of January, A. D. 1888, the defendant Otto Nelson purchased in good faith and for a valuable consideration all the right, title, and interest of the said Willoughby Clark in and to said lot of ground and the said dwelling-house situated thereon; that the consideration paid by him to the said Clark for the said premises was the sum of $1,000.00, and that the defendant aforesaid has since that time expended in making improvements on the said lot and dwelling-house *in* the sum of $2,000.00, all of which the said defendant, Otto Nelson, has done in good faith, having been advised by his said grantor, who at the time of the said purchase by the said defendant was a practicing attorney at the bar of this court and advised this defendant that the possessory right in and to the said premises derived by the said Clark in the manner hereinbefore set forth was a good and valid one and legally subject to conveyance and when conveyed would give the purchaser thereof a good, valid, and subsisting right
39 and title to the said premises, excepting only the paramount title of the United States.

11.

That the said defendant, Otto Nelson, hereby pleads the consideration price paid by him for the said premises and the value of all of said the improvements placed thereon by him and his grantor as a set-off against any damages the plaintiff may recover herein in case the verdict shall be in his favor.

Wherefore the defendant prays the judgment of this court adjudging him the possession of the premises mentioned and described in the complaint, and also pray- that in case the possession thereof shall be awarded to the plaintiff the said defendant, Otto Nelson, may be adjudged to have the value of the improvements made on the said lot by him and his said grantor allowed as set-off against any damages the plaintiff may be found entitled to herein, and for his costs and disbursements of this action.

DELANEY & GAMEL,
Att'ys for Def'ts.

40 UNITED STATES, }
District of Alaska, } *ss*:

Otto Nelson, being first duly sworn, deposes and says: I am one of the defendants named in the above-entitled action, and that I have heard the foregoing answer read, and the allegations as are

therein stated upon information and belief and such facts I believe to be true.

OTTO NELSON.

Subscribed and sworn to before me the 5th day of March, A. D. 1890.

[SEAL.] H. E. HAYDON, *Clerk.*

Filed March 5, 1890.

H. E. HAYDON, *Clerk.*

41 In the United States District Court for the District of Alaska.

THEODOR HALTERN, Pl'f,
vs.
GEORGE T. EMMONS and OTTO NELSON, Def'ts. } Reply.

The plaintiff, for reply to defendants' amended answer filed herein, says:

1st.

Denies that at the time the treaty of March, 1867, whereby Russia ceded Alaska to the United States, was concluded the premises in dispute were occupied by the ice-house or any other building of a corporation created by the Russian government and called the Russian-American Company, and denies that said premises were occupied by and that said ice-house and other buildings were owned or belonged to any foreign corporation or company; denies that by reason of the provisions of said treaty said property mentioned and described was thereby transferred to the United States free and clear from all right, title, and in-
42 terest of the said Russian-American Company in and to the same for any reason other than that said company had no possession, right, or interest in said property at said time.

2nd.

Denies that during the summer and fall of 1887 said Willoughby Clark entered upon and took possession of said lot as a part of the unused and unoccupied public domain of the United States subject to entry and occupation as such.

3rd.

As to the 10th count in defendants' answer, plaintiff says he does not know and has no means of knowing the truthfulness of any of said allegations, and therefore denies that on the 24th day of January, 1888, or at any other time defendant Nelson purchased in good faith and for a valuable consideration all the right, title, and interest of said Clark to said lot and the house situate thereon; denies that Clark had any right, title, or interest in or to said lot

and said building; denies that said Nelson paid Clark
43 $1,000.00 for the same, and denies that said Nelson has since expended $2,000 in improvements on said lot and dwelling-house.

Denies that said Clark was at said time a practicing attorney at the bar of this court, and denies that said Clark advised said Nelson that his possessory right to said premises was good or legally subject to conveyance.

UNITED STATES, }
District of Alaska, } ss:

Theodore Haltern, being first duly sworn, says he is the plaintiff in the above-entitled cause; that he knows the contents of the foregoing reply, and that same is true, as he verily believes.

THEOD. HALTERN.

Subscribed in my presence and sworn to before me this 7th day of March, 1890.

[SEAL.] H. E. HAYDON, *Clerk.*

Filed March 7, 1890.

H. E. HAYDON, *Clerk.*

44 In the District Court of the United States for the District of Alaska.

THEODORE HALTERN, Plaintiff,
vs.
GEORGE T. EMMONS and OTTO NELSON, Defendants. } Demurrer.

The defendants in the above-entitled action demur to the replication filed in the above-entitled action for the reason that said replication does not state facts sufficient to constitute a reply to defendants' answer.

DELANEY & GAMEL,
Att'ys for Def'ts.

Filed March 10, 1890.

H. E. HAYDON, *Clk.*

45 In the United States District Court for the District of Alaska.

THEODOR HALTERN, Plaintiff,
vs.
GEO. T. EMMONS and OTTO NELSON, Defendants. } Motion for Nonsuit.

The defendants move the court that a judgment for nonsuit be entered against said plaintiff for the reasons that the plaintiff has failed to prove a cause sufficient to be submitted to the jury and has

failed to prove that he, the said plaintiff, has a legal title to the premises in dispute.

DELANEY & GAMEL,
Att'y- for Def'ts.

Filed March 11, 1890.

H. E. HAYDON, *Clerk.*

Judge's charge to the jury is as follows:

46 This is an action brought by Theodore Haltern against George T. Emmons and Otto Nelson to recover the possession of a certain lot of land lying within the town of Sitka, also for damages for the unlawful withholding thereof.

It is the duty of the court to give you all necessary information as to the law; but you are instructed that you are the exclusive judges of all questions of fact, no matter what statement the court may make in regard to them.

Nevertheless, the court's instructions as to law should control you.

The action is brought under the statutes of Oregon applicable to this district, which provide in substance, that:

Any person who has a legal estate in real property and a present right to the possession thereof may recover such possession with damages for withholding the same by an action at law.

Such action must be commenced against the person in the actual possession of the property at the time, and was properly brought in this case against the defendant Emmons and against the defendant Nelson, his landlord, who is the person who was acting as the owner of the land. The defendant Emmons has pleaded that he was only in possession as tenant of the defendant Nelson, disclaiming any other interest in the premises, himself; and your verdict in this case will, in effect, be for or against the plaintiff, or for or against the defendant Nelson, alone.

If your verdict be for the plaintiff, it should find that he is entitled to the possession of the property described in the complaint, and should find the nature and duration of his estate, with such damages for withholding the property, up to the time of your verdict, exclusive of the use of permanent improvements made by defendants. And if you find that defendant Nelson or those under whom he claims, have made permanent improvements upon the property in good faith, holding under color of title adversely to the claim of plaintiff, the value of such improvements at the time of trial, must be allowed by you as a set-off against such damages. The nature and duration of the estate, to be found by you, must be such nature and duration as were recognized by the treaty between Russia and the United States, the articles of transfer and subsequent acts of Congress, for farther than this it will be impossible to go under existing circumstances. Of course, if you do not find any damages in favor of the plaintiff, the value of improvements made by defendant, cuts no figure in the case.

If your verdict be for the defendant-, it must find that the plain-

tiff is not entitled to the possession of the property described in the complaint, or any part thereof.

This is merely a possessory action, but, to maintain it, plaintiff must have a legal interest in the property and a present right of possession which existed at the commencement of the suit.

It is not necessary that plaintiff should show a perfect title, but he must recover on the strength of his own title and not on the defects of that of his adversary.

Plaintiff must have had a legal estate at the time of the commencement of the action, as contradistinguished from an equitable title, and so far as any one could have a legal estate other than an estate in fee simple in Alaska, he must be considered to have had such, if the same could have been derived from his grantors and predecessor in interest.

A legal title may be acquired by adverse possession for such a length of time that the statute of limitations may be invoked to sustain it; that is to say, undisturbed possession may ripen into a legal title, and as against one party a person may have a legal title, though as against the Government it may not have been perfected.

The title to land in Alaska is in an anomalous position. With the exception of some few titles in fee simple, which were recognized by the treaty between Russia and the United States, there is no such thing as private ownership of land in fee simple in the Territory. Plaintiff's legal interest, if he has any, was acquired in the following manner and under the following circumstances:

The land in dispute is part of the territory ceded by the imperial government of Russia to the United States, pursuant to the treaty of March 30, 1867. That cession included all ungranted lots of ground in Sitka, (and it is not claimed by either party that this land has ever been granted by the Russian government to any one,) but it did not include private dwellings and warehouses, ice-houses, etc., these having been left subject to the control of their owners. This property is claimed to have been occupied prior to, and at the time of, the cession, by plaintiff's grantors as an ice-house, and if you find such to be the fact, the buildings so used were not transferred to this Government by the treaty, but such buildings remained subject to the control of their owners who retained also a possessory right to the land on which they were erected, such possessory right being naturally essential to the enjoyment of their property, but such owners had no title in fee to the land in dispute, it not being one of the granted lots, as I have stated.

When the actual transfer of the territory was made on Oct. 26, 1867, the commissioners of the respective governments attached to their certificate or articles of transfer, certain inventories of public and private property in Sitka, embracing that which was actually transferred as well as that which remained in individual
47 ownership. One of these inventories was marked "D" and was designated: "Inventory of private property in the city of New Archangel (Sitka) with the numbers and letters indicating the situation of dwelling-houses, establishments and lots of ground

as marked on the plan of the city attached to the protocol of transfer."

There was also a map which has been offered in evidence here as the plan of the city referred to in the inventory.

The inventory and map show that lot numbered 55 on the plan was described as an ice-house. This is the lot in dispute in this action.

Plaintiff claims that prior to and at the time of the transfer the ice-house was the property of J. Mora Moss and Charles Baun, their ownership having been certified to prior to the transfer by the governor of the Russian colonies in America; that Moss and Baun assigned their interest therein to plaintiff, who took possession thereof and fenced in the lot prior to 1885; that in 1887, one Clark, the defendant's grantor, wrongfully entered upon the lot and in place of the ice-house, which had been blown down, erected a house, which at the time of the commencement of the action was occupied by the defendant Emmons.

Defendant denies any transfer to Moss and Baun by the governor, the transfer to plaintiff by Moss and Baun, and that the premises were ever listed or marked as private property by the commissioners of the two governments, but admits the entry by Clark and his sale to defendant Nelson, and claims that at the time of the execution of the treaty, the premises were occupied by and belonged to the Russian-American Company, a corporation existing under a charter from the Russian government, and that under the provisions of that treaty all the rights, grants, privileges and franchises of said company within Alaska were extinguished, and this property in question was transferred to the United States and thereupon became subject to entry and occupation as unused and occupied domain of our Government, (although no evidence has been offered as to that,) and that as such unused and unoccupied land, Clark rightfully entered upon and took possession of it and erected a dwelling-house thereon.

If you should find that at the time of the cession the property in dispute was in fact the ice-house on lot numbered 55 on the plan, that the same was owned by said Moss and Baun, and that they or either of them transferred their right to plaintiff, and that he has not parted therewith and that his possession was prior to that of defendant, then it follows as a matter of law that plaintiff had such a legal estate in the property as under the statute would entitle him to maintain the action. And unless defendant can show a better title and a present right of possession plaintiff is entitled to a verdict at your hands.

The interest and estate held by Moss and Baun was held by them in common. It has not been shown that plaintiff succeeded to the interest of Moss by any regular conveyance—Moss having died and the deed of his executrix and executor being insufficient to convey his interest. But a deed from Baun to plaintiff has been put in evidence, the legal effect of which is to make plaintiff a tenant in common with the heirs or devisees of the deceased; and as such tenant in common, plaintiff is entitled to maintain this suit against

the defendant; and if you find that plaintiff has so succeeded to the title of Baun, then you may, if other circumstances permit, find a verdict for plaintiff for the entire interest, notwithstanding the fact that he is the owner of only an undivided interest in common, and that his cotenant is not joined.

Although defendant sets up in his answer that the premises in dispute were at the time of the cession the property of a corporation, he does not claim to have succeeded to its interest and does not in fact set up nor has he attempted to prove any legal estate whatever, but relies upon his right to occupy and possess the land as unused and unoccupied domain of the United States.

In order to defeat the plaintiff, defendant must show that his right to occupy and possess the land is superior to that of plaintiff. That is he must show that the premises were unused and unoccupied public domain at the time he entered into possession. If they were used and occupied by plaintiff at that time, and that plaintiff was an owner in common as successor to Baun, defendant's grantor, Clark, as against the plaintiff was a mere intruder without any rights whatever, and whatever buildings he erected were erected at his own risk, and your verdict must be for plaintiff.

As I have stated, under the existing laws neither plaintiff nor defendant can claim a fee simple title to the land in controversy. The treaty and acts of cession recognized absolute titles only to the building which was on the land, the right to possession of which is in dispute here. But that right to possession was distinctly affirmed by the "organic act," passed May 17, 1884, which said: "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which said persons may acquire title to such lands is reserved for future legislation by Congress."

If plaintiff or his grantor Baun, at the time of the passage of the organic act, was actually in the use or occupation of the land in dispute, or claimed it, whether in their own right or tenants in common, the Government could not disturb him, and he and his
48 tenant in common were and are, unless they abandoned all claim, the only persons who could obtain title by future legislation as against the defendant, he or his cotenant have the only legal estate in the property which is recognized by the organic act so far as there can be any legal estate.

If you should find for plaintiff it is your duty to consider and admeasure what, if any, damages he has sustained by reason of the wrongful occupation by the defendant of the premises; but against these you may offset, so far as it may be, the value of the improvements put on the premises, if you believe such improvements were made in good faith. The fact that defendant's grantor was a lawyer and advised defendant that his title was good, has nothing to do with your verdict except in so far as it may show defendant's good faith in the matter.

By JOHN BUGBEE, *Dst. Judge.*

49 In the District Court of the United States for the District of Alaska.

THEODOR HALTERN
vs.
GEO. T. EMMONS and OTTO NELSON, Def'ts. } Verdict.

We, the jury duly impaneled and sworn to try the above-entitled cause, do find and say that at the commencement of this action and at this time the plaintiff was entitled to the possession of the property in the complaint described, and that the nature and duration of his estate *as* such as *was* derived through the treaty between the United States and Russia and subsequent acts of Congress.

We further find that the defendant is entitled to the buildings erected by himself and grantors and entitled to the right to remove the same within such reasonable time as may be designated by the court.

CHS. GEE, *Foreman.*

Filed March 11, '90.

H. E. HAYDON, *Clerk.*

50 In the District Court of the United States for Alaska.

THEODOR HALTERN, Plaintiff,
vs.
GEO. T. EMMONS and OTTO NELSON, Def'ts. } Exceptions.

Exceptions Taken by Defendants as Made in Open Court During the Trial.

1.

Defendants objected to plaintiff giving any evidence under his proceedings, as the complaint failed to set forth the nature and extent of the estate of the plaintiff in the disputed premises, and that a failure on the part of the plaintiff to allege the nature of his estate, whether in fee, for life, or for a term of years, was fatal to the jurisdiction of this court.

Objection overruled.

2.

Defendants moved that the plaintiff be nonsuited on the grounds that the documentary evidence of title upon which the plain-
51 tiff relied does not give him such a legal estate as will entitle the plaintiff to maintin an action in ejectment, as said documentary evidence of title shows the legal title of the premises in dispute to be in the United States, and that plaintiff and his grantors are and were occupie-s of the public domain of the United States without right or title.

(Motion overruled and defendants except.)

The above exceptions were taken to the rulings of the court on the trial.

JOHN S. BUGBEE,
U. S. Dist. Judge.

Filed March 15, '90.

H. E. HAYDON, *Clerk.*

52 In the United States District Court in and for the District of Alaska.

THEODOR HALTERN, Plaintiff,
vs.
GEORGE T. EMMONS and OTTO NELSON, Defendants.

And now, on this 10th day of March, 1890, this cause coming on to be heard and a jury having been demanded by defendants, the jury was duly impaneled and sworn to try and determine the issues in the above-entitled cause.

And on the 11th day of March, 1890, the jury, after hearing the evidence in the case, the arguments of counsel, and the instructions of the court, and after due deliberation, *the jury* having returned the following verdict, to wit:

"We, the jury duly impaneled and sworn to try the above-entitled cause, do find and say that at the commencement of this action and at this time the plaintiff was entitled to the possession of the property in the complaint described, and that the
53 nature and duration of his estate are such as were derived through the treaty between the United States and Russia and subsequent acts of Congress.

"We further find that defendant is entitled to the buildings erected by himself and grantors and entitled to the right to remove the same within such reasonable time as may be designated by the court."

It is therefore ordered and adjudged that at the commencement of this trial plaintiff was entitled to the possession of the following-described real property, to wit: Lot No. 55 as marked on the plat and map attached to the protocol of transfer when Alaska was ceded to the United States by Russia, and situated in Sitka, in Alaska, and is now entitled to the possession thereof, and the nature and duration of his estate in and to said property are such as were derived through the treaty between the United States and Russia and subsequent acts of Congress in relation to such tracts or lots of land as are marked on said map attached to such protocol of transfer.

54 It is further adjudged and decreed that said defendant, Otto Nelson, is entitled to the buildings erected by himself and grantors, and by consent and agreement of counsel for plaintiff defendant is hereby given sixty days from the date of this judgment to remove said building- from said premises of plaintiff.

It is further adjudged and decreed that plaintiff have and recover from defendants his costs and disbursements herein expended, taxed

at $124.20, and judgment is hereby rendered against said defendants in favor of said plaintiff for such costs as well as for the possession of said premises described.

(Signed) JOHN S. BUGBEE,
U. S. Dist. Judge.

55 In the District Court of the United States for the District of Alaska.

THEODORE HALTERN, Plaintiff,
vs.
GEO. T. EMMONS and OTTO NELSON, Defendants. } Motion for New Trial.

Comes now the defendants, by their attorneys, and moves the court to set aside the verdict rendered in this case, and assign the following reasons:

1.

That said verdict was contrary to the law and to the evidence and the instructions of the court.

2.

That said verdict is so vague and uncertain in its terms that process of this court could not legally issue thereon.

DELANEY & GAMEL,
Att'ys for Def't-

56 In the United States District Court for the District of Alaska.

THEODOR HALTERN, Plaintiff,
vs.
GEO. T. EMMONS and OTTO NELSON, Def'ts. } Petition for Writ of Error.

The petition of the above-named defendants shows to this honorable court that the above-entitled action was commenced in this court on or about the 11th day of October, A. D. 1889.

That during the month of March, A. D. 1890, said cause came on for trial at a special term of this court and was duly tried and determined at a special term of this court and was duly tried and determined then and there; that on the trial of said cause, as shown by the records and files therein, many manifest errors hath happened, to the great damages of said defendant-.

That the matter in dispute in said action exceeds the sum of three thousand (3,000) dollars, exclusive of costs, and that said defendants relied upon the provisions of the treaty between Russia and the United States bearing date March 30, 1867, and the acts
57 done pursuant to the provisions of said treaty by the commissioners appointed by Russia and the United States subsequent to the date of said treaty and prior to the year 1868, said commissioners being appointed by said governments to consum-

mate the turning over of Alaska to the United States; and this court construed said treaty and acts against the said defendants and against the true meaning and spirit of said treaty and acts; that said defendants relied upon the organic act organizing the district of Alaska in an judicial district, passed May 17th, A. D. 1884, said act making the laws of the State of Oregon acts of Congress and extending such laws, as such, to the said district of Alaska, and that this court construed section 8 of said organic act against the rights of said defendants; that this court construed sections 316, 318, and 321 of said act of Congress embraced in the Oregon laws made applicable to this district against the rights of said defendants and against the true meaning and spirit of said law embraced in said sections.

58 The defendants herewith files a bond, with good and sufficient sureties, for *his* taking said cause on a writ of error to the Supreme Court of the United States from this said court and for paying all costs that may be awarded by said Supreme Court and all damages that said plaintiff may sustain by reason of the detention of the property in dispute from him, if such detention be wrongful or without sufficient cause, and all damages of whatsoever nature that may be awarded against said defendants if the defendants there fail to make their plea good, as provided by the statutes and laws applicable thereto.

Wherefore the defendants prays this honorable court that a writ of error issue in this said cause; that said bond may be approved, and that citation issue to the adverse party, the plaintiff above named.

And your petitioner will ever pray, etc.

OTTO NELSON.

DELANEY & GAMEL,
Att'ys for Def'ts.

59 UNITED STATES, }
District of Alaska, } *ss:*

A. H. Gamel, being first duly sworn, deposes and says: I am one of the attorneys for defendants in the above-entitled action, and that I am the attorney who conducted said cause for said defendants, as specified in the foregoing petition, and know of my own knowledge of the facts set forth in the foregoing petition, and said facts are true, as I verily believe.

That said facts as above set forth are more properly within my knowledge than that of Otto Nelson, the said defendant; it is but meet and proper that this verification should be made by me than by the said defendant.

A. H. GAMEL.

Subscribed and sworn to before me this 2nd day of April, A. D. 1890.

[SEAL.] A. E. HAYDON, *Clerk.*

Filed April 3, 1890.
H. E. HAYDON, *Clerk.*

60 In the United States District Court for Alaska.

GEO. T. EMMONS and OTTO NELSON, Plaintiffs in Error,
vs.
THEODOR HALTERN, Defendant in Error.

The United States of America to Theodor Haltern, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1890, pursuant to a writ of error filed in the clerk's — of the United States district court in and for the district of Alaska, wherein Otto Nelson and George T. Emmons — plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

61 Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court of the United States, this the 3rd day of April, A. D. 1890.

HENRY E. HAYDON.

[SEAL.] *Clerk U. S. Dist. Court, Dist. of Alaska.*

62 UNITED STATES OF AMERICA:

The President of the United States to the honorable judge of the district court of the United States for the district of Alaska, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between Theodor Haltern, defendant in error, and George T. Emmons and Otto Nelson, plaintiffs in error, wherein was drawn in question the construction of a treaty and statutes of the United States, it is claimed that a manifest error hath happened, to the great damage of the said plaintiff- in error, as by their said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

63 then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error whatever of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 3rd day of April, A. D. 1890.

HENRY E. HAYDON,
Clerk U. S. Dist. Court.

[SEAL.]

Allowed by—
JOHN S. BUGBEE,
U. S. Dist. Judge, Dist. of Alaska.

Filed April 3d, 1890.
H. E. HAYDON, *Clerk.*

64 In the District Court of the United States for Alaska.

GEO. T. EMMONS and OTTO NELSON, Plaintiffs in Error,
vs.
THEODOR HALTERN, Defendant in Error.

Know all men by these presents that we, Otto Nelson, Augustus Nelson, Abraham Cohen, Stephen A. Gee, and Henry Barth, are held and firmly bound unto Theodor Haltern in the full and just sum of fifteen hundred ($1,500.00) dollars, to be paid to the said Theodor Haltern, certain attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of April, A. D. 1890.

Whereas lately a judgment in a suit pending in the district court of the United States in and for the district of Alaska between the said Theodor Haltern, defendant in error, there plaintiff, and
65 the said George T. Emmons and Otto Nelson, plaintiffs in error, there defendants, was rendered against the said plaintiffs in error, and the said plaintiff- in error having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued directed to the said Theodor Haltern, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs in error shall prosecute their writ of error to effect and answer all damages for the withholding of the premises and all costs if the said plaintiffs in error fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

OTTO NELSON.
AUGUSTUS NELSON.
A. COHEN.
STEPHEN A. GEE.
HENRY L. BAHRT.

Sealed and delivered in the presence of—

—— ——.

66 UNITED STATES OF AMERICA, } ss:
District of Alaska, }

Augustus Nelson, Abraham Cohen, Stephen A. Gee, and Henry Barth, being first duly sworn, each for himself deposes and says for himself: I am worth the sum of five hundred ($500.00) dollars over and above all just debts and liabilities and exemption.

AUGUSTUS NELSON.
A. COHEN.
STEPHEN A. GEE.
HENRY L. BAHRT.

Subscribed and sworn to before me this 2nd day of April, A. D. 1890.

[SEAL.] HENRY E. HAYDON, *Clerk.*

Approved:
JOHN S. BUGBEE,
U. S. Dist. Judge, Dist. of Alaska.

67 In the United States District Court in and for the District of Alaska.

THEODOR HALTERN, Plaintiff,
vs.
GEORGE T. EMMONS and OTTO NELSON, Defendants. } No. 211.

I, Henry E. Haydon, clerk of the United States district court in and for the district of Alaska, hereby certify that I have compared the foregoing transcript with the original papers in the above-entitled action now on file in my office, and that the said transcript is correct.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 12th day of April, 1890.

[Seal United States District Court, Alaska.]

HENRY E. HAYDON, *Clerk.*

68 Whereas it is understood that the country known as the Russian possessions in America has been disposed of by treaty between his majesty the Emperor of all the Russians and the United States, and that commissioners on the part of both government will at an early day arrive to formally deliver said possessions: Now, therefore, for the purpose of and in order to enable privat- individuals to obtain the proper legalized certificates and proofs of title to properties which belong to them—

These presents declare and certify to whom it may concern that J. Mora Moss and Charles Baum, citizens of the United States, residing at San Francisco, California, for t-emselves and their associates, have heretofore owned and possessed and do still owne and possess in their own right the following-described pieces or parcels of property, to wit:

First. All that piece or parcel of property situated in the town of

New Archangel, Sitka, known as the "ice-house," which is a large building in the im-edicate neighbourhood of the church, op-
69 posit- the building known as the "club-house;" also the timber road lea-ing from that lake which lies im-ediately behind said town and called "Lake Labaishia" or "Swan lake," to said ice-house, and all the improvements thereon; also the dams which have been constructed for the purpose of deepening the water of the said lake for the purpose of making and procuring ice.

Second. All that certain piece or parcel of property situated in the town of New Archangel aforesaid, at the mouth of the outlet of said Swan lake or "Lake Labarshia," on the westerly side of said outlet, known as a steam and water power saw-mill, planing-mill, &c., together with all its appurtenances, improvements, attachments, flumes, dams, and water rights.

Third. All that certain piece or parcel of property situated in the town of New Archangel aforesaid, on the westerly side of the road and imm*a*diately opposit- the said saw-mill last mentioned, known as the foundry, together with all its appurtenances, *e*mprovements, attachments, dams, water rights, &c.

Fourth. All the property, buildings, outhouses, dams,
70 wharves, fish-traps, and improvements of all kinds whatsoever which constitutes the fishing establishment on the "Redutsky Oscro (Lake Redusky), situated to the southward from New Archangel, Sitka, near Redutsky bay.

Fifth. All the property and improvements of whatsoever sort or kind situated on Leshay Wood island, near Kodiac, consisting, for the most part, of ice-houses, wharf, saw-mill, dams, artificial lakes, stables, dwelling-houses, blacksmith shops, &c., &c.; and I further certify that the above-named persons have acquired the above-described properties by purchase or improvement or construction, and that they have conducted a valuable and important business in ice in these possessions for many years past and still do carry on the same; and I further declare that no other individual or individuals, company or companies, corporate or incorporate, have any right, interest, control, or possession in the above-described properties or in any part thereof.

In witness whereof I have hereunto set my hand and caused to be affixed the seal of the gove-nor of the Russian colonies
71 in America, at New Archangel, this second day of October, 1867.

The words "known as the foundry" inte*r*lined between the 7th and 8th lines from the bottom of the second page before signing.

P. MAKSAUTOFF,

[SEAL.] *Governor of Russian Colonies in America.*

Sitka, October 26, '67.—Approved, but it is not intended to recognize by this approval any interest in the land on which the improvements are as against the United States. The title to the buildings, improvements, privileges, & easements referred to is valid.

We certify to that fact in accordance with our instructions touching such matters.

ALEXIS PESTCHOUROFF,
Russian Commissioner
LOWELL H. ROSSEAU,
United States Commissioner.

THE UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, Henry E. Haydon, recorder *ex officio* for the district of
72 Alaska, do hereby certify that the foregoing copy of the deed of P. Maksautoff to Mora Moss and Charles Baum has been by me compared with the original and that it is a correct transcript therefrom and of the whole of such original as the same appears of record in Deed Book "A," page- 4 and 5, of the records of the district of Alaska.

In testimony whereof I have hereunto set my hand the 7th day of April, A. D. 1890.

H. E. HAYDON,
Ex Officio Recorder, Dist. of Alaska.

73 This indenture made the nineteenth day of June A. D. one thousand eight hundred and eighty-four (1884) between Charles Baum of the city and county of San Francisco State of California party of the first part and Theo. Haltern of the town of Sitka, Alaska Territory party of the second part witnesseth: That the said party of the first part for and in consideration of the sum of five dollars to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged has remised released and quitclaimed and by these presents does remise release and quitclaim unto the said party of the second part all the undivided one-half interest of the said party of the first part of in and to the following described pieces parcels or tracts of land and property situate in the town of Sitka Alaska Territory viz: First. All that certain piece or parcel of property known as a steam and water saw-
74 mill containing also machinery for planing and other work situated on the westerly side at the mouth of the outlet of Lake Labreshia (Swan Lake) in the town of New Archangel Sitka together with all its appurtenances improvements contents and attachments also the flumes connecting it with the dam, the dams water rights power &c. and also that certain other piece and parcel of property situated and being in the said town of New Archangel and lying on the westerly side of the road immediately opposite the before-mentioned saw-mill known as a copper and iron foundry together with all the attachments appurtenances and contents and its water rights flumes dams &c. It is understood that the dams and water rights above mentioned belonging equally to the above two pieces of property and to a small flour mill on the same water-course and the intention of this instrument is to convey an undivided one-half of the undivided two-thirds part of all said rights

and dams. Also all that piece or parcel of property situated
75 in the town of New Archangel, Sitka, known as the ice-house property and any improvements now thereon. Together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion, and reversions remainder and remainders rents issues and profits thereof. And also all the estate right title interest property possession claim and demand whatsoever as well in law as in equity of the said party of the first part of in or to the above-described premises and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

76 CHAS. BAUM. [SEAL.]

Signed and sealed in the presence of—
CH'S STEPHENS.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

On this sixteenth day of September, A. D. one thousand eight hundred and eighty-four, before me, Sam'l S. Murfey, a notary public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared Charles Baum, known to me to be the person described in and who executed and whose name is subscribed to the within and annexed instrument, and he acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

SAMUEL S. MURFEY,
[SEAL.] *Notary Public.*

77 THE UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, Henry E. Haydon, recorder *ex officio* for the district of Alaska, do hereby certify that the foregoing copy of the deed of Charles Baum to Theodore Haltern has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record in Deed Book No. 1, page- 7, 8, 9, of the records of the district of Alaska.

In testimony whereof I have hereunto set my hand the 7th day of April, A. D. 1890.

H. E. HAYDON,
Ex Officio Recorder, Dist. of Alaska.

78 Know all men by these presents that Willoughby Clark and Georgena, his wife, parties of the first part, in consideration of one thousand dollars to them paid by Otto Nelson, of the

second part, all of Alaska, do hereby remise, release, and forever quitclaim unto the said party of the second part and to his heirs and assigns all their right, title, and interest in and to the following described parcel of real estate, situate in the town of Sitka, in the Territory of Alaska, the said parties of the first part being now in the actual and *bona fide* possession thereof and having the full right to quitclaim the same, said property being described as follows, to wit:

Lot fifty-five (55) of the said town of Sitka as laid out and marked on the map and inventories attached to and made a part of the protocol of transfer of the said Territory of Alaska by Russia to the United Slates.

And the said parties of the first part covenant and agree to and with the party of the second part that they will warrant and
79 defend the title to the said property against all persons whomsoever, save and except only the United States, so long as the above-named grantee hold absolute possession of the said premises herein described.

To have and to hold the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part and to his heirs and assigns forever.

In witness whereof we have hereunto set our hands and seals this 24th day of January, A. D. 1888.

W. CLARK. [SEAL.]
GEORGENA CLARK. [SEAL.]

Signed, sealed, and delivered in presence of—
J H. KING.
JOHN G. BRADY.

DISTRICT OF ALASKA, *ss:*

This certifies that on this 24th day of January, A. D. 1888, before me, the undersigned, a court commissioner in and for said district, personally appeared the within-named Willoughby Clark
80 and Georgina, his wife, who are known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

And the said Georgina Clark, wife of the said Willoughby Clark, on an examination made by me, separate and apart from her said husband, acknowledged to me that she executed the same freely and voluntarily and without fear of coercion or compulsion from any one.

In testimony whereof I have hereunto set my hand and affixed my seal the day and year last above written.

JOHN G. BRADY,
U. S. Commissioner.

[SEAL.]

THE UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, Henry E. Haydon, recorder *ex officio* for the district of Alaska, do hereby certify that the foregoing copy of the deed of Willoughby & Georgena Clark to Otto Nelson has been by me compared
81 with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record in Deed Book No. 1, page- 185 & 186, of the records of the district of Alaska.

In testimony whereof I have hereunto set my hand the 7th day of April, A. D. 1890.

H. E. HAYDON,
Ex Officio Recorder, Dist. of Alaska.

82 UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, Henry E. Haydon, clerk of the United States district court in and for the district of Alaska, do hereby certify *the* the foregoing copies hereto attached are true and correct copies of the original exhibits offered in evidence at the trial of the cause therein entitled, and also of the exceptions taken by the defendants therein, and also of the pleadings, verdict, and judgment; and also certify that the bill of exceptions hereto attached is the original bill of exceptions as settled by the Hon. John S. Bugbee, judge of said court, presiding, and that the signature to said bill and the allowance thereof is the genuine signature of said Judge John S. Bugbee.

Witness my hand and official seal, at Sitka, Alaska, this 12th day of April, A. D. 1890.

[Seal United States District Court, Alaska.]

HENRY E. HAYDON, *Clerk.*

Endorsed on cover: Case No. 14,434. Alaska D. C. U. S. No. 361. George T. Emmons and Otto Nelson, plaintiffs in error, *vs.* Theodore Haltern. Filed December 3, 1890.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 69.

GEORGE T. EMMONS AND OTTO NELSON,
PLAINTIFFS IN ERROR,
vs.
THEODORE HALTERN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

This suit was an action of ejectment, brought by the defendant in error, to recover possession of a certain parcel of land in the town of Sitka, Alaska, which was a part of the land ceded by Russia to the United States under the treaty of March 30, 1867. It was then occupied by an ice-house, and was designated as "No. 55" on the map of Sitka and accompanying inventories attached to the protocol of transfer.

The treaty of March 30, 1867, (15 Stat., 539), and the instructions to and acts of the Commissioners of the two countries, dealt quite exactly with the title to real estate in Alaska, and at the cession the lot here in question became the property of the United States. In the transcript of inventory "D," prepared by the Commissioners and attached to the protocol of transfer, which was an inventory of private property, No. 55 appears to be occupied by a "sea house;" but this is doubtless a clerical or typographical

error, and was intended for "ice-house," (Ex. Doc., H. R., No. 125, 40th Cong., 2d Sess.,—a copy of which is herewith filed). The status of lots of this kind in Sitka, and of the buildings on them, has recently been fully considered by this court in Kinkead *vs.* United States, (150 U. S., 484). In that case it was held that the warehouse there involved, which also appears in inventory "D," passed to the United States as part of the realty.

The name of the owner of the ice-house is not stated in the inventory, but in the record (fols. 68-71) appears a copy of the certificate of P. Maksautoff, Governor of the Russian Colonies in America, approved by the Russian and American Commissioners, executed immediately prior to the cession, which recites that J. Mora Moss and Charles Baum, "for themselves and their associates," own "the *property* known as the ice-house," together with a timber road leading from it to Swan Lake, and the dams in said lake used for ice-making purposes; "but," say the two Commissioners," it is not intended to recognize by this approval any interest in the *land* on which the improvements are as against the United States." This certificate was prepared by direction of Secretary Seward, for the purpose of facilitating the retention or the disposal of private property by its owners (Ex. Doc. No. 125, *supra*). In their protocol of transfer, the Commissioners state that the owners of the buildings mentioned in inventory "D" have "no title in fee to the lands on which they are situated" (*Ibid.*). The learned judge in the court below stated to the jury that it was conceded by both parties that title to the land was in the United States, but charged, as matter of law, that after the cession the building remained the private property of its alleged owners, and entitled them to the possession of the land (Record, fol. 46).

In his complaint (fol. 27), filed October 11, 1889, the plaintiff founded his right of action on this certificate, treating it as *a conveyance*, and averred a sale and assignment to

him by Moss and Baum of "all their right, title and interest in and to said house and lot," supporting this averment by a deed—purporting to be made at San Francisco, Cal., June 19, 1884, acknowledged at the same place September 16, 1884, and delivered on a day not stated—which is a release and quit-claim to Haltern by Charles Baum, of the city and county of San Francisco, Cal., of the latter's "undivided half interest" in the "land and *property*" specified, and, among other parcels, "all that piece or parcel of property situated in the town of New Archangle, Sitka, known as the ice-house property, and any improvements now thereon" (fols. 73–75).

The complaint also averred "that said ice-house was some years ago blown down by a storm, and all of it removed except said foundation" "of heavy timbers laid at short intervals along the ground;" that plaintiff was absent from Sitka and Alaska, on account of impaired health, from 1885 until 1889; that before so leaving Sitka he placed a good and substantial fence around the lot, which has been there ever since; that before so leaving he was in possession of the lot, claiming the same as his own; that "when he left he put all his *matters* in the hands of his agent, and kept an agent there looking after his *interests* until his return;" that in the fall of 1887 one W. Clark went on the lot, built a house, and a year afterwards sold it to the defendant, Otto Nelson, whose tenant the defendant Emmons is; and that he is entitled to possession of the lot, and to $500 damages for withholding the same.

The defendant Emmons disclaimed all interest in the lot except as tenant of the defendant Nelson (fol. 33).

The defendant Nelson made answer (fols. 34–40), in which he denied the material allegations of the complainant, except as to the entry on the lot by Clark in 1887; averred that said ice-house was at date of the treaty of March 30, 1867, the property of the Russian-American Company, whose interest in it was extinguished by said treaty; that the lot

was part of the public domain of the United States when said Clark took possession of it and erected the dwelling-house now on it; that on January 24, 1888, he in good faith purchased Clark's interest in the lot and dwelling house, paying Clark therefor $1,000; and that afterwards he expended $2,000 in improving said lot and house. He pleaded by way of set-off the said consideration price and the value of all the improvements placed on the lot by him and his grantor. A quit-claim deed of the lot by W. Clark and wife appears in the record (fols. 77–81) as the foundation of the defendant Nelson's claim.

At the trial the defendant took the several exceptions hereinafter mentioned, and upon which error is assigned in his bill of exceptions (fols. 2–15). The judge's charge to the jury is twice recited in full in the record (fols. 16–26 and 46–48). The jury found for the plaintiff for the land, but awarded no damages; and found for the defendant as to the building, and that he was entitled to remove it in a reasonable time (fol. 49); and judgment was accordingly entered (fols. 52–54).

The Rights of the Parties.

Before taking up the assignments of error, it may be well to consider the rights of the respective parties to this piece of land prior to and at date of the suit.

The land itself belonged to the United States, and was therefore a part of the public domain. But the general land laws of the United States had not yet been extended to Alaska, though to a certain extent possessory rights in Alaskan lands were recognized by Section 84 of the Organic Act of May 17, 1884, (23 Stat., 24). Whether this special recognition extended to the land in controversy will be discussed below; but, whether or not it did so, the learned judge who sat in this case has said in another case, (Miller *v.* Blackett, 47 Fed. Rep., 547), that the courts of Alaska have sustained the possession and improvements of town lots and the transfers based on them.

Under this decision, the defendant Nelson acquired a prima facie valid claim to the land by virtue of Clark's prior possession and deed of transfer, (*supra*). He averred a purchase from Clark in good faith (fol. 38), the plaintiff denied it (fol. 42), the court charged the jury on this point (fols. 17, 23, 26), and the jury awarded the dwelling house to the defendant (fol. 15). Wherefore he was in possession under color of title, both on general principles (Wright *v.* Mattison, 15 How., 280), and under the statute of Oregon (Hills Ann. Laws, 1887, Sec. 3004; Swift *v.* Mulky, 14 Or., 59), which was in force in Alaska by virtue of Section 7 of the said Act of May 17, 1884. Being thus in actual and peaceable possession, the plaintiff must show a title, or a prior and superior possessory right, to recover the land in this action.

The plaintiff founds his title on the certificate of the Russian and United States Commissioners (fol. 68), reciting as follows:

> "That J. Mora Moss and Charles Baum, citizens of the United States, residing at San Francisco, California, for themselves and their associates, have heretofore owned and possessed and do still own and possess . . . all that piece or parcel of property known as the ice-house; . . . but it is not intended to recognize by this approval any interest in the land on which the improvements are as against the United States. The title to the buildings . . . is valid."

It is a significant fact that Moss and Baum represented some company of persons called "their associates," whose identity is not further referred to. The defendant charged that the ice-house belonged to the Russian-American Company (fol. 36). The plaintiff denied this (fol. 41), but in such terms as were apparently evasive, and which caused the plaintiff to file a demurrer (fol. 44), which does not appear to have been pressed. In the late case of Kinkead *vs.* United States, 150 U. S., 484, it was found that all the

private buildings in Sitka belonged to the Russian-American Company, except the dwellings transferred from them to their employés (p. 488); and it was ruled that under the treaty they became the property of the United States, and this notwithstanding they were placed in inventory "D" as private property (p. 494). The certificate relied on in the case at bar was made by Maksautoff, who was president of the Russian-American Company, and was approved by the two Commissioners; but it was made for the same purpose as, and evidently binds the Government no more than the inventory of so-called private property. Hence, under the court's finding of fact and law in the case cited, the plaintiff's title to the building would wholly fail, together with the alleged possessory right based on it.

In any event it is clear that Moss and Baum had no freehold interest of any kind in the land prior to the cession. The certificate so recites, the inventory so states, and the plaintiff, who has made them a part of his complaint, is bound by them. What license these persons may have had under Russian law, by virtue of the permit to erect the building for storing ice, is not averred or shown. The only property right they had was in the building.

After the cession, Moss and Baum could have had no higher right to the land than they had before it. A permissive possession under the Russian-American Company, or a foreign government, not adverse, gives no claim against the United States. (United States *v.* Serrano, 5 Wall., 451.) Supposing that the land was subjected to the servitude of a license under Russian law, it does not follow that it so remained when transferred to the United States; for the only evidence on the subject is the certificate, and that can prove nothing more than the purpose in making it warrants, which was, as stated by Secretary Seward (Ex. Doc. No. 125, *supra*) "in order that the said individual proprietors may retain their property as aforesaid, or, if they should prefer, dispose of the same." A bare possessory right to the

land, so long as the building stood on it, would seem to be the highest claim they could make.

There is no averment or evidence that Moss, or Baum, who resided in San Francisco, or any one for them, ever stored ice in the ice-house, or used it for any purpose, or were in actual occupation of the premises. The complainant avers that "the said ice house was some years ago blown down by a storm, and all of it removed except said foundation" (fol. 28) "of heavy timbers laid at short intervals along the ground." (Fol. 27.) There is no averment or evidence of an effort, intention, or desire to rebuild it, and the materials composing it were "removed,"—apparently "disposed of," as contemplated by the commissioners' certificate. Manifestly every right of possession of the land fell with the building. Even a license might then be revoked (Washburn, Easements and Servitudes, 4th Ed., page 31), and an easement would under such circumstances be deemed extinguished or abandoned. (Ibid., 701, 714.) When the building sell does not appear, but, construing the evasive averment against the plaintiff, it was while Moss and Baum still owned it. Baum's deed to the plaintiff (conveying "any improvements now thereon) indicates that he knew that the old icehouse had been removed.

The plaintiff claims the land under the quit-claim deed of Moss and Baum (fol. 28); but the deed is Baum's only, is of "an undivided half interest," and purports to convey the realty (fols. 73–75). Obviously, on the facts just recited, it conveys nothing; and, having no basis in the certificate or inventory, it could not even give color of title.

If in fact the ice-house was standing at date of this deed, the plaintiff could take no higher interest than his pretended grantor; and, for the reasons above mentioned, that was determined by the fall of the building.

Thereafter the plaintiff was, like any other claimant of a part of the public domain not subject to disposal under the land laws, a mere occupant of this lot, and that only so long

as he remained in actual possession of it. He avers taking possession, but not *possessio pedis* (fol. 28). He afterwards put a fence around it, and in that condition left it whilst absent from the country for four years; and if he could thus hold this lot, he could have fenced up and held indefinitely a hundred lots in Sitka, or vast tracts of land around it. That such is not the law needs no demonstration. The purpose of a fence is to indicate the boundaries of possession (Tyler on Ejectment, Ch. 50), and that was unnecessary on a platted lot in Sitka. Its erection was not an act of possession, being "nothing more than an act presumptive of an intention to assert ownership and possession (Ellicott *vs.* Pearl, 10 Pet., 412–442). There is a lame attempt to raise an inference that the plaintiff's agent was in possession during the four years of the plaintiff's absence (fol. 28), but such is not even a fair implication from the evasive averment. Hence the plaintiff abandoned his possessory right to this lot in 1885.

It was while the land was thus vacant, in 1887, that Clark, the defendant's grantor, went into actual possession of it.

First Assignment of Error.

Error in overruling the following objection, in the nature of a demurrer to the complaint (fol. 8):

> "Defendant objected to the plaintiff giving any evidence under his pleadings, as the complaint failed to set forth the nature and extent of the estate of the plaintiff in the disputed premises, and that a failure on the part of the plaintiff to allege the nature of his estate, whether in fee, for life, or for a term of years, was fatal to the jurisdiction of this court."

This objection was based upon the language of the statute of Oregon (Compiled Laws, 1887), under which the action was brought, as follows:

> "Sec. 316. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. . .
>
> "Sec. 318. The plaintiff, in his complaint, shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him, to his damage such sum as may be therein claimed." . . .

The complaint makes no pretense of complying with Sec. 318. It sets forth (fol. 27), as follows:

> "That when Alaska was ceded, lot 55 was occupied by an ice house, the property of J. Mora Moss and Charles Baum, and the same was conveyed to them by P. Maksautoff, by deed dated October 2, 1867, which was approved October 26, 1867, by the Commissioners, as appears by Record Deed Book 'A' at pages 4 and 5, and listed by them as private property. That said Moss and Baum sold, assigned, and transferred all their right, title and interest in and to said house and lot to the plaintiff."

There is here an averment of property in the ice-house, but not in the land, in Moss and Baum; and the certificate and inventory, by reference incorporated into the complaint, show that Moss and Baum had no "interest in the land" whatever, and therefore that their estate was neither "in fee, for life, nor for a term of years." This omission is material, for "the great end of the action of ejectment" in Oregon is to settle this very question of tenure, (Thompson *v.* Wolf, 6 Oregon, 308, 310).

The learned judge charged the jury (fol. 20) in reference to the evidence of plaintiff's title, that "the inventory and map show that lot number 55 on the plan was described as an ice-house." This contradicts the complaint, which merely avers that the lot was "occupied" by an ice-house,

and it is in fact a palpable mistake. Inventory "D" does not purport to describe the lot as private property, and to designate it as an ice-house; but it describes the ice-house as private property, and designates its "situation" as on lot 55.

Second Assignment of Error.

Error in overruling the defendant's motion for a non-suit as follows (fol. 8):

> "Defendant moved that the plaintiff be non-suited on the ground that the documentary evidence of title on which the plaintiff relies does not give him such a legal estate as will entitle the plaintiff to maintain an action of ejectment, as said documentary evidence of title shows the legal title of the premises in dispute to be in the United States, and the plaintiff and his grantors are and were occupiers of the public domain of the United States, without right or title."

The facts stated in this motion are incontestable, and the question is: Were they sufficient to justify the motion? Sec. 246, Oregon Code of 1887, reads as follows:

> "A judgment of non-suit may be given . . . 3. On motion of the defendant . . . when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to a jury."

A prerequisite to bringing this action is "a legal estate . . . in fee, for life, or for a term of years, (Secs. 316, 317, *supra*). On the plaintiff's own showing he had no such estate, for "an estate in lands signifies such interest as the tenant hath therein" (2 Black. Com., 104), and the certificate on which he founded his title recites that his pretended grantors were without "any interest in the land." The most they had was a possessory right by virtue of actual occupation, but the estate itself (Sec. 316) distinguished the "legal estate" from the "right to the possession thereof."

Upon the acquisition of territory by this country from France, Spain and Mexico it has happened in many cases that persons had bare possessory claims to lands; but as is well known, neither Congress nor the courts have regarded these claims as legal estates. Certificates of location under our own land laws have been held insufficient to support injectment, (Hooper *v.* Scheimer, 23 How., 326; Fenn *v.* Holme, 21 How., 481), though such certificates will support an equitable action, (Stark *v.* Starr, 6 Wall., 402). In early days in Oregon, the law gave ejectment to a person "having a valid, subsisting interest in real property," and it was held that a valid donation certificate might support the action, (Keith *v.* Cheney, 1 Oregon, 285); but since then, as the existing statutes exhibit, the law has been changed.

There can be no presumption of a legal estate from the fact of prior possession, as there is with the defendant here, because the plaintiff was not in actual possession when the defendant's grantor went on the land, but was merely indicating by his fence an intention to take possession (cases *supra*).

Third Assignment of Error.

The third assignment of error relates to various portions of the judges charge to the jury, which, with some change in the relation of the propositions, may be stated as follows:

I.

Error in charging the jury as follows:

> "The nature and duration of the estate to be found by you must be such nature and duration as was recognized by the treaty between Russia and the United States, the articles of transfer, and subsequent acts of Congress; for further than this it will be impossible to go under existing circumstances" (fol. 3).

The error complained of here is the converse of the last above referred to; that is, the jury were directed to find the nondescript estate suggested by the learned judge, instead of an estate "in fee, for life, or for a term of years," as indicated by the statute; and the jury so found (fol. 15).

II.

Error in charging the jury as follows:

> "Plaintiff must have had a legal estate at the time of the commencement of the action, as contradistinguished from an equitable title; and, so far as one can have a legal estate other than fee-simple in Alaska, he must be considered to have had such, if the same could have been derived from his grantors or predecessors in interest" (fol. 4).

Admitting that, under the statute of Oregon, this action must have a "legal estate" to support it, the learned judge here asserts that it may be some other sort of an estate than that pointed out in that statute (namely, "in fee, for life, or for a term of years") and therein misstates the law. And he misstates the facts in referring to the plaintiff's pretended grantors as "predecessors in interest," when the foundation evidence of their estate declared that they had no "interest in the land." And again, when he alludes to Moss and Baum as "grantors," when in truth they merely quit-claimed what interest they had in the lot, which was none.

III.

Error in charging the jury, as follows:

> "A legal estate may be acquired by adverse possession for such a length of time that the statute of limitation may be invoked to sustain it; that is to say, undisturbed possession may ripen into a legal title; and, as against one party, a person may have a legal title, though as against the Government it may not have been perfected" (fol. 4).

The apparent effect of this was to lead the jury to suppose that the plaintiff had a legal estate in this land, though in truth he had a mere license to occupy it, which was permissive and in no sense adverse to the owner of the legal title. The charge is misleading, in that it assumes a possible existing legal title against the defendant by adverse possession, of which there is no evidence or suggestion in the case; in that it suggests a possible future perfected title by adverse possession against the United States, which is legally impossible (Gibson *v.* Choteau, 13 Wall., 92); in that it alleges a possible adverse possession based on a claim of title to the ice-house, whereas such possession must rest on an original claim to the fee (Ricard *v.* Williams, 7 Wheat., 59); in that it declares that a legal title may issue from "undisturbed possession" alone, whereas the possession must also be adverse, continuous, open, notorious, actual and exclusive (Armstrong *v.* Morrill, 14 Wall., 120); and in that it asserts the existence in the plaintiff of a possible fictitious legal title by prior posssession against the defendant, while the actual legal title is admittedly in the United States; whereas mere prior possession of Government land gives only a preferred right of purchase if the United States ever determines to sell (Shepley *v.* Cowan, 91 U. S., 330). This court has distinctly ruled that in Oregon, before the land laws of the United States were extended to it, the right acquired by possession was not a legal title (Lamb *v.* Davenport, 18 Wall., 307).

IV.

Error in charging the jury as follows:

> "If you should find that at the time of the cession the property in dispute was in fact the ice-house on lot 55 on the plan, that the same was owned by Moss and Baum, and that they or either of them transferred their right to plaintiff, and that he has not parted therewith, and that his possession was

> prior to that of defendant, then it follows, as matter of law, that plaintiff had such a legal estate in the property as under the statute would entitle him to maintain the action; and, unless defendant can show a better title and a present right of possession, plaintiff is entitled to a verdict at your hands" (fols. 4 and 5).

This part of the charge is an extraordinary jumble of the facts and the law. The "property in dispute" could not have been "the ice-house," and yet the jury were instructed that they might find that fact and base a verdict upon it. As a matter of fact, the record showed that Moss and Baum owned the ice-house, and this made the above mentioned instruction all the more misleading. The instruction as a whole mixes up most confusingly Moss and Baum's admitted property in the ice house with their alleged property right in the land, deduces a legal estate in the land from the ownership of the house on it, and mistakenly supposes that Moss and Baum could transfer a personal license to occupy the land.

V.

Error in charging the jury, as follows:

> "In order to defeat the plaintiff the defendant must show that his right to occupy and possess the land is superior to that of plaintiff; that is, he must show that the premises were unused and unoccupied public domain at the time he (his grantor?) entered into possession. If they were used and occupied by plaintiff at that time, and plaintiff was owner in common as successor to Baum, defendant's grantor, Clark was a mere intruder, without any right whatever, and whatever buildings he erected he erected at his own expense, and your verdict must be for plaintiff" (fol. 5).

The first part of this instruction errs in throwing the burden of proving a superior possessory right on the

defendant, whereas such a superior right in the defendant is presumed from the mere fact of possession, and the burden of proof is on the plaintiff. The second part of the instruction omitted the necessary qualification that, to maintain ejectment, the plaintiff's use and occupation, being of public land of the United States, must have been actual, open, and notorious, (Plume *v.* Seward, 4 Cal., 95; Sankey *v.* Noyes, 1 Nev., 71); whereas on the face of his complaint, which binds him, it was neither of these. Hence the jury were authorized to find a sufficient use and occupation by the plaintiff, which, on the acknowledged facts, could not legally be found.

A person in peaceable actual possession, if ousted, can rely on the possession alone; but if the land was vacant when the defendant took it, the plaintiff must show more. (Tyler on Ejectment, 784.) And if such possession has not been continuous, the burden of showing that his absence was not an abandonment is on the plaintiff (Sabarilgo *v.* Maverick, 124 U. S., 261), which in the case at bar he has not attempted to do. Nay, he has not even averred it; nor can it be fairly implied from the evasive language of his complaint.

VI.

Error in charging the jury, as follows:

> "If plaintiff or his grantor, Baum, at the time of the passage of the organic act was actually in the use or occupation of the land in dispute, or claimed it, whether in their own right absolutely or as tenants in common, the government could not disturb him; and he and his tenant in common are, unless they abandoned all claim, the only persons who could obtain the title by future legislation. As against the defendant, he or his co-tenants have the only legal estate in the property which is recognized by the organic act, so far as there can be any legal estate" (fol. 6).

This instruction leaves the jury to find abandonment as a question of fact, whereas, by reason of the facts recited in the complaint, it was a question of law.

But apart from this the learned judge had in mind, and held to be applicable to the case, Sec. 8 of the Act of May 18, 1884, (23 Stat., 24), the material parts of which are as follows:

> "Sec. 8. That the said district of Alaska is hereby created a land district . . . And the laws of the United States relating to the mining claims and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district;
>
> "*Provided*, That the Indians and other persons in said district shall not be disturbed in the possession of any lands actually in their use and occupation, or now claimed by them; but the terms under which said persons may acquire title to such lands is reserved for future legislation by Congress;
>
> "*And provided further*, That parties who have located mines . . . or who have occupied, or improved, or have exercised acts of ownership over such claims shall not be disturbed, etc.
>
> "But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

By the rules of construction, this first proviso was intended to carve out an exception from the preceding provision, and consequently means that the possession of lands then claimed, used, or occupied shall not be disturbed *under the mining laws;* though the government will not yet permit the possessors themselves to acquire title, except that persons then in possession of mining claims may acquire title; but these provisions are not to be construed as introducing into the territory the general land laws. When it is remembered that the mining laws authorize the exploration and possession of any part of the public domain for mining purposes, unless there be a prior vested claim to it

under the general land laws, and that Congress was about to leave the residents in Alaska without any rights under the general land laws to lands occupied, used, or claimed by them, the necessity of an exception to the mineral laws in favor of these residents becomes apparent, and as well the object and purpose of the first proviso. But the learned judge below has interpreted this proviso as vesting a legal estate in such lands against the United States, which could not thereafter be disturbed; and this, notwithstanding the ruling, that no such vested right could arise under our perfected public land laws, even after possession taken in pursuance of them, (Yosemite Valley Case, 15 Wall., 77).

But, were the provision applicable, there is no averment in the complaint of the facts necessary to bring the plaintiff within its protection, and such averment was necessary to his recovery (United States *vs.* Perryman, 100 U. S., 235). Nor is there any evidence of such facts.

By the Organic Act of Oregon (9 Stat., 323), certain lands "now occupied" as missionary stations were confirmed to the occupants; but it was held that the act did not apply to persons not in actual or personal occupation, though they had buildings and improvements on the land, and it was afterwards claimed by them and was the subject of transfer (Missionary Society *vs.* Dallas City, 107 U. S. 336). As ruled in that case, there can be no constructive possession of public lands, such as was claimed of the missionary society's buildings, or such as was apparently credited to Moss and Baum's ice-house, and after that blew down, to the plaintiff's fence.

VII.

Error in charging the jury as follows:

> "If your verdict be for the plaintiff, it should be that he is entitled to the possession of the property described in the complaint, and should fix the nature and duration of such estate, with such damages for the withholding of the property up to the

time of your verdict, exclusive of the use of permanent improvements made by the defendant. And if you find that the defendant Nelson, or those under whom he claims, have made permanent improvements upon the property in good faith, holding under color of title adversely to the claim of plaintiff, the value of such improvements at the time of trial, must be allowed by you as a set-off against such damages. Of course if you do not find any damages in favor of the plaintiff, the value of the improvements made by the defendant cuts no figure in the case" (fol. 3).

The foregoing instruction is based on Sec. 321, Oregon Compiled Laws of 1887, which reads as follows:

> "Sec. 321. The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and from any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title adversely to the plaintiff, in good faith, the value thereof at the time of trial shall be allowed as a set-off against such damages."

The plaintiff claimed $500 damages for withholding possession from him (fol. 39), and the defendant pleaded the consideration price $1,000, and the value of the improvements $2,000, as a set-off. It is to this alone that the charge of the judge was addressed.

But defendant did more,—he averred a purchase of the property in good faith for $1,000, under the professional advice of his grantor, a practicing attorney; that his conveyance and improvements vested a good title in the defendant against all the world but the United States; and that he had expended $2,000 more in improving the lot

and dwelling house (fol. 38). The conveyance from Clark gave him color of title, and he held adversely to the plaintiff. He averred that his grantor entered into possession in the summer of 1887 (fol. 37), and in this the plaintiff concurs (fol. 29), himself averring that he was then absent from Sitka, but that "when he left he put all his matters in the hands of his agent, and kept an agent there looking after his interests until his return." Whether this absence was an abandonment the judge left to the jury to determine, and, since they might have found no abandonment because of the possession of the plaintiff's agent, it would have followed that the plaintiff's agent stood by and saw Clark enter upon and improve the lot as vacant or abandoned land, and sell it to the defendant, without suggestion or remonstrance. Since, under such circumstances, it would be inequitable for the plaintiff to gain by his agent's misconduct, whilst at the same time relying on his agent's possession, the judge should have charged the jury further, that, if they found such a state of facts, the defendant was entitled to affirmative equitable relief in this action by virtue of Sec. 580, Laws of Oregon, 1887, (formerly Sec. 377), namely, to the value of his own improvements, and to the purchase price, or value of those placed there by Clark; and this on the authority of Hatch *v.* Briggs, (6 Oregon, 31). The facts in said case and in the case at bar are closely assimilated, and the court there held the plea of set-off to be in substance an equity pleading, and under it the defendant entitled to the relief above stated.

Fourth Assignment of Error.

Error in refusing the following instruction prayed for by the defendant (fol. 13):

> "If you find for the plaintiff, and you believe that the defendant purchased said premises in good faith, and improved the same in good faith, you shall find

that the defendant Otto Nelson shall have and recover the purchase price and the amount of improvements placed upon the premises, from the plaintiff."

This instruction was requested under the authority of Hatch *v.* Briggs (*supra*).

Fifth Assignment of Error.

Error in overruling the defendant's motion to set aside the verdict as follows (fol. 14):

> "Come now the defendants, by their attorneys, and move the court to set aside the verdict rendered in this cause and assign the following reasons:
>
> "1. The said verdict was contrary to the law and to the evidence, and to the instruction of the court.
>
> "2. The said verdict is so vague and uncertain in its terms that process of this court could not legally issue thereon."

The verdict rendered is as follows (fols. 15, 49):

> "We, the jury duly empannelled and sworn to try the above entitled cause, do find and say that at the commencement of this action and at this time the plaintiff was entitled to the possesssion of the property in the complaint described, and that the nature and duration of his estate are such as were derived through the treaty between the United States and Russia and subsequent acts of Congress.
>
> "We further find that defendant is entitled to the buildings erected by himself and grantors, and entitled to remove the same within such reasonable time as may be designated by the court."

The Oregon law in regard to verdicts in these ejectment cases is as follows:

> "Sec. 320. The jury by their verdict shall find as follows: 1. If the verdict be for the plaintiff that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be."

Neither the nature nor the duration of the plaintiff's estate is set forth in a manner comprehensible to the legal mind. Following the judge's charge as it does, it is tantamount to finding that the plaintiff's interest had no nature or duration. Had the jury found it to be a tenancy at will, or by sufferance, it would have at least complied with the statute. Having failed to so comply, the verdict is void.

Pensacola Ice Company *v.* Perry, 120 U. S., 318.

By his own showing, the plaintiff's pretended grantors held this land, if they held it at all, "for themselves and their associates" (fol. 68), and the conveyance of Baum, who alone quit-claimed to the plaintiff, states the interest conveyed as "the undivided one-half interest" (fol. 73), and again refers to it as "an undivided one-half of the undivided two-thirds part" of it (fol. 74). These discrepancies, and the outstanding interests, made it all the more important that the jury should find "the undivided share or interest" of the plaintiff, as required by the statute; for "the great end of the action of ejectment" in Oregon is to settle these very questions (Thompson *v.* Wolf, *supra*). Having failed to follow the statute, the verdict is void.

The award of the dwelling-house to the defendant, with permission to remove it within a reasonable time, is not only unsanctioned by the statute under which the action was brought, unprayed for by the defendant in his cross action, but is directly in the teeth of the judge's charge. Wherefore the verdict is void.

The verdict is embodied in the judgment (fol. 53), but it is not seen how process of the court enforcing it can legally issue, further than to put the plaintiff in possession, which would execute but a part of it.

Respectfully submitted.

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M. B. Gerry,
Attorneys for Plaintiff in Error.

NOV 1 1894
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

October Term, 1894.

GEORGE T. EMMONS and OTTO NELSON,
Plaintiffs in Error,
vs.
THEODORE HALTERN,
Defendant in Error.
} No. 69.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF ALASKA.

BRIEF FOR DEFENDANT IN ERROR.

H. B. MOULTON,
JAMES H. McCREERY,
JAMES H. FENNESSY,
Attorneys for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

COUNTER STATEMENT OF FACT.

On October 2, 1867, the title to and possession of the property in dispute in this action was in J. Maun Moss and Charles Baum, under a deed of that date made by the Governor of the Russian Colonies in America, which conveyance, on October 26, 1867, was approved by the Commissioners appointed by Russia and the United States to make the transfer of Alaska, under the treaty of March 30, 1867; the deed was duly recorded.

The property is also found in Inventory "D" attached to protocol of transfer and designated as "Inventory of private property in the City of New Archangel (now Sitka) with the numbers and letters indicating the situation of dwelling houses, establishments and lots of ground as marked on the plan of the City attached to the protocol of transfer." The lot No. 55, is described in inventory as an Ice house.

From October 2, 1867 until June 19, 1884, Messrs. Moss and Baum continued in the undisputed ownership and possession of this property. On the latter date Theodore Haltern, the defendant in error, purchased the half interest of Baum and entered into possession of his purchase. Moss died and his executor and executrix conveyed his undivided half interest to Haltern, but it seems that the deed was not deemed a legal conveyance, hence in the case we have to deal with Haltern as a tenant in common with an undivided half interest in the property and in possession—either before or after his purchase the ice house had been blown down, but he enclosed the entire lot with a substantial board fence which still surrounds the property, and his possession and title was not questioned.

In 1885 Haltern left Alaska and was gone until 1889, but left his business in the hands of an agent in Sitka, thus evidencing his intention to return—and his possession was never disputed until the latter part of 1887, when, without the knowledge or consent of Haltern or his agent, one, W. Clark, a lawyer and in this case a mere intruder, entered upon the property under an alleged claim that it was part of the public domain and erected thereon a house, and on January 4, 1888 sold the property to one, Otto Nelson, who at the time of suit claimed to own the same.

In 1889 Haltern returned to Alaska, and discovering the wrongful entry on Lot 55, began his suit of ejectment which resulted in a verdict in his favor in the court below.

The issue thus stands with the defendant in error or his grantors in possession of title of whatever nature from October 2, 1867, till latter part of 1887—and Clark an intruder and his grantee Nelson with a possession of less than a year.

The certificate of approval, signed by the Commissioners referred to above, contained this clause, "but it is not in-

tended to recognize by this approval any interest in the land on which the improvements are as *against the United States.*"

The statement on page 10 of brief of plaintiff in error as follows: "the certificate on which he founded his title recites that his pretended grantors were without 'any interest in the land,'" and statement on page 12 as follows: "the foundation evidence of their estate declared that they had 'no interest in the land,'" are plain inaccuracies of statement. No such statements appear in certificate and the reservation is only a saving clause of which only the United States can take advantage.

ARGUMENT.

It is not claimed for the defendant in error that he or his predecessors were the owners of the fee simple in Lot 55, but it is claimed that "so far as any one could have legal estate other than an estate in fee simple in Alaska he must be considered to have such title." As stated by the learned Judge who tried the case below, titles in Alaska were in "an anomalous position." Without question, the fee simple title to Lot 55 vested in the United States, by the transfer under the treaty of 1867—but few fee simple titles were outstanding in the territory, and these are specially noted in the protocol of transfer, the land laws authorizing pre-emption of public lands have not been extended to Alaska, and as the cession did not include private dwellings, warehouses, ice-houses, etc., they were left subject to the control of their owners who retained also a possessory right to the land on which they were erected, such use and possession being a necessary adjunct to the right of ownership of the structure. This was the status of the defendant in error and his grantors, and

any question of title arising between Haltern and the United States must be decided in favor of the United States, but even in that respect the defendant in error bears a privileged relation; for while a party by mere settlement on public lands does not thereby obtain a vested right to make an entry, the pre-emption laws give to the the settler only a privilege of pre-emption in case the lands are offered for sale, that is, the privilege to purchase them in that event in preference to others.

Yosemite Valley Case, 15 Wallace, 77.

The issue here is whether the possessory right clearly in defendant in error entitles him to possession as against the intruder Clark and his grantee.

The defendant in error, either as the sole owner of the possessory right or as tenant in common, is entitled to recover as against all persons except his co-tenant or parties holding under him.

Treat *vs.* Reilly, 35 Cal., 129.

Thence, whether the title outstanding in Moss was legally transferred to defendant in error will not affect his right of possession.

The fact of prior possession by defendant in error was determined by the verdict of the jury. Whatever was the nature and character of his title no mere intruder could eject him and hold on the weakness of the title of the defendant in error.

In Saberigo *vs.* Maverick, 124 U. S., 261, quoted by plaintiff in error, the law is clearly stated:

"The plaintiff says he was seized in fee and the defendant ejected him from possession. The defendant, not denying this, answers that if the plaintiff had any paper title it was under a certain grant which was not valid, he shows no title

whatever in himself, but a mere intruder cannot enter as a person actually seized and then question his title or set up an outstanding title in another. * * * If the plaintiff had actual prior possession of the land this is strong enough to enable him to recover it from a mere trespasser who entered without any title."

This would seem to settle the case in favor of defendant in error.

Plaintiff below was in legal possession of the land and had been for twenty years; in his temporary absence though land was enclosed with a new substantial fence, an evidence of ownership and in charge of his agent—the defendant below took possession, and when ejectment is brought says in substance, I have no title, it is true I am a mere intruder, and though you have been in possession for twenty years, yet because you have no paper title in fee to the land I am now in possession and claim title as against you.

The reply in the language by the court is, the defendant in error "had actual prior possession of the land and this is enough to enable him to recover it from a mere trespasser who entered without any title."

This being the law, it seems unnecessary to take up the assignments of error consecutively, but one seems to call for a reply, namely, the "Fifth" as to form of verdict—the best reply that can be made is that in the unsettled condition of titles in Alaska the best form of language of which the nature of such titles was susceptible was used; the extent of the possessory right in defendant in error can only be determined by subsequent legislation; the fee simple is in the United States; the possessory right in the defendant in error; whether it can ever be changed into an estate of a higher or more definite nature and duration is entirely dependent on subsequent legislation. However this may be, it cannot affect the rights of the plaintiff in error, He had no kind of title